(3)

No. 89-839

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ARIZONA, PETITIONER

v.

ORESTE C. FULMINANTE

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether respondent's confession was involuntary because respondent made the statement in response to an offer by an undercover informant to protect respondent from other inmates at the prison where respondent and the informant were incarcerated.

2. Whether the admission of a defendant's involuntary confession can ever be harmless error.

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INTEREST OF THE UNITED STATES

The use of an informant to obtain information from a suspect is a valuable law enforcement tool, even when the suspect is incarcerated. Federal informants frequently obtain statements from inmates that are used in prosecutions of those inmates for crimes committed while they were in prison or earlier. The United States also prosecutes cases referred from state or local authorities in which confessions were obtained from incarcerated suspects. The Court's resolution of the first question in this case will affect the circumstances under which the federal government may use this law enforcement tool.

The United States also has an interest in the Court's interpretation of the harmless error doctrine. Questions of harmless error arise constantly in federal criminal cases, and the Court's resolution of the second question in this case will affect the role of the harmless error doctrine with respect to an entire class of errors—those

involving the admission of defendants' statements that are subsequently held to be involuntary.

STATEMENT

1. On September 14, 1982, respondent telephoned the Mesa, Arizona, Police Department to report the disappearance of his 11-year-old stepdaughter, Jeneane Hunt. Jeneane's body was discovered in the desert two days later. She had been shot in the head at close range with a large-caliber weapon. She also had a ligature tied around her neck that could have been used to choke her. Pet. App. A6-A7.

Because of inconsistencies in respondent's statements to the police and his recent purchase of an interchangeable barrel for a .357 revolver, respondent became a suspect in the murder investigation. No charges were filed, however, and respondent left the State. He was later convicted of the federal crime of possession of a firearm by a felon and was incarcerated in the federal correctional facility at Ray Brook, New York. While at the Ray Brook facility, respondent befriended Anthony Sarivola, a former associate of the Columbo organized crime family who was serving a 60-day sentence for extortion. Unbeknownst to respondent, Sarivola had become an informant for the Federal Bureau of Investigation, but he continued to pose as an active member of organized crime while in prison. J.A. 134-137; Pet. App. A8-A10.

After hearing a rumor that respondent was suspected of murdering a child in Arizona, Sarivola spoke with respondent about the rumor. Respondent denied committing the murder. Sarivola told his FBI contact about the rumor, and the agent told Sarivola to learn more about it. J.A. 80-82.

One evening, while Sarivola and respondent were taking a walk in the prison yard, Sarivola spoke with respondent, who was "starting to get some rough treatment and whatnot from the guys" concerning the rumor. J.A. 83. Sarivola offered to protect respondent from the other inmates, but he told respondent, " 'You have to tell me about it,' you know. I mean, in other words, 'For me

to give you any help.' " *Ibid.* Respondent then admitted to Sarivola that he had sexually assaulted and choked Jeneane, that he had forced her to beg for her life, and that he had killed her. J.A. 83-85, 138, 147-148; Pet. App. A10.

Sarivola was released from prison in November 1983; respondent was released six months later. Upon respondent's release, Sarivola and his fiancee, Donna, met respondent at a bus terminal. Donna asked respondent if he wanted to see any relatives or friends. Respondent said that he could not return to his home since he had killed "a little girl" in Arizona. Respondent added that he had first sexually assaulted and choked his victim, and had forced her to beg for her life. J.A. 166-169, 177-178; Pet. App. A10-A11.

2. Before trial, respondent moved to suppress his statements. In order to avoid having to testify at an evidentiary hearing, respondent adopted the statement of facts contained in the State's opposition to his suppression motion. J.A. 30-31.[1] The trial court denied the mo-

[1] The State described the facts as follows:

> It is a fact that Anthony Sarivola was at all times pertinent to this case a paid confidential informant for the F.B.I. He was an informant in matters that related to organized crime in the Brooklyn, New York City area. It is also true that while incarcerated in Raybrook Prison in upstate New York various rumors reached Mr. Sarivola that [respondent] had killed his step-daughter in Arizona.
>
> Initially these were rumors and initially the truth of the rumors was denied by [respondent]. It is also true that Mr. Sarivola passed the rumors on to the F.B.I. Upon being informed of those rumors, the F.B.I. agent, Mr. Walter Ticano, supposedly said ". . . that's just a rumor, you'll have to find out more about it . . . before I can act upon it," or words to that effect. The witness, Anthony Sarivola, went back to [respondent] and asked him if these rumors were in fact true, adding that he, Mr. Sarivola, might be in a position to help protect [respondent] from physical recriminations in prison, but that [respondent] must tell him the truth. Thereupon [respondent] told Mr. Sarivola that he, in fact, had killed his step-daughter in Arizona, and gave him substantial details about how he killed the child. At no time did [respondent] indicate that

tion to suppress, stating that "[t]he Court does not find that the statements allegedly made in this case were the result of promises, threats or coercion by the Government or any of its agents." J.A. 44. Both statements were admitted at trial.

3. The Arizona Supreme Court initially affirmed respondent's conviction, although it held that respondent's confession to Anthony Sarivola should not have been admitted. Pet. App. A1-A95. Based in part on this Court's opinion in *Bram* v. *United States*, 168 U.S. 532, 543 (1897), the court adopted the rule that a confession is involuntary if it was "obtained by 'any direct or implied promises, however slight, [or] by the exertion of any improper influence.'" Pet. App. A23. Applying that principle, the court held that respondent's statement to Sarivola was involuntary since it was given in response to Sarivola's promise of protection. *Id.* at A21 n.1, A22-A24. Nonetheless, the court held that the admission of the statement to Anthony Sarivola was harmless beyond a reasonable doubt. *Id.* at A24-A30. The court reasoned that respondent's subsequent statement to Sarivola's fiancee was not the "fruit of the poisonous tree" and was admissible, *id.* at A24-A25, that "the invalid first confession was cumulative of the admissible second confession," *id.* at A29-A30, and that "due to the overwhelming evidence adduced from the second confession, if there had not been a first confession, the jury would still have had the same basic evidence to convict [respondent]," *id.* at A30.

4. Respondent moved for reconsideration, and the court granted his motion. Pet. App. B1. In a supplemental opinion, the court held, over one dissent, that under this Court's precedents, the admission of a defendant's involuntary confession cannot be harmless. *Id.* at C4-C10.

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he was in fear of other inmates[,] nor did he ever seek Mr. Sarivola's "protection".

J.A. 10. Respondent conceded on appeal that these were the "pertinent facts" in light of his stipulation in the trial court. Appellant's Opening Br. 3.

Therefore, the court held, "until and unless the Supreme Court changes the law, we must order [respondent] retried without the use of the coerced confession." *Id.* at C10.

SUMMARY OF ARGUMENT

In reversing respondent's conviction, the Arizona Supreme Court relied on two propositions adopted by this Court in *Bram* v. *United States*, 168 U.S. 532 (1897): first, a confession is involuntary if it is the product of any governmental inducement, even a slight one, made to a suspect to encourage him to confess; second, the admission of a defendant's involuntary confession requires a reversal of his conviction in every case. The first proposition, however, is no longer an accurate statement of the law. This Court's subsequent decisions have not applied such a per se rule. Instead, the Court has held that the totality of the circumstances must be considered in deciding whether a suspect's confession is involuntary. The second proposition, while never reconsidered by this Court, is no longer valid in light of subsequent developments in the harmless error doctrine.

1. A suspect's confession is considered involuntary if, due to coercive government misconduct, his free will has been overborne. In cases not involving violence or the threat of violence, a confession is deemed voluntary unless the police conduct is considered unacceptably coercive under all the circumstances. Most courts have declined to read *Bram* literally and have rejected the per se rule under which a confession is considered involuntary if it is the product of any governmental inducement, no matter how slight.

When a confession is made in response to an inducement, as opposed to some form of coercion, there is seldom any danger that the confession will be unreliable. Furthermore, inducements ordinarily cannot be said to deprive the suspect of his freedom to decide whether to confess. Suspects are typically capable of rationally weighing the advantages and disadvantages of offers of leniency made in exchange for confessions. Moreover,

except in the most extreme cases, offering an inducement in exchange for a confession and cooperation by the suspect is not regarded as unconscionable government conduct. For these reasons, the Court should hold that the per se rule in *Bram* barring confessions based on any inducement at all is no longer good law.

Under the proper standard, respondent's confession was plainly voluntary. He spoke to Sarivola, with whom he was on friendly terms, during a casual conversation while they were taking an evening walk. Sarivola did not use or threaten violence against respondent. In fact, Sarivola offered to use his influence to protect respondent from others. Moreover, Sarivola did not concoct the rumors of respondent's involvement in the murder of a child in order to induce respondent to confess to the murder. Respondent was therefore not "compelled" to admit his guilt in any sense that the law recognizes.

2. *Bram* adopted a rule of automatic reversal during a time when any trial error required reversal of a defendant's conviction. Since then, Congress and every State have adopted harmless error laws, and the Court has repeatedly held that constitutional errors can be harmless in a proper case. The rationale of *Bram* is also no longer valid. Although *Bram* saw a "contradiction" in the assertion that evidence can be both "probative" and "harmless," there is no such contradiction under modern principles of appellate review. An appellate court's ruling that the erroneous admission of evidence was harmless means only that its admission did not have a material effect on the verdict, not that the evidence had no probative force and was therefore irrelevant.

The erroneous admission of a defendant's confession also shares none of the attributes of the errors that the Court has deemed prejudicial per se. The improper admission of evidence does not affect the composition of the record; it therefore does not require an appellate court to make a difficult inquiry concerning what might have happened if the proceedings had taken a very different course. Moreover, the Court has held that the admission of a defendant's statements obtained in violation of the

Sixth Amendment can be harmless, *Satterwhite* v. *Texas*, 486 U.S. 249 (1988); *Milton* v. *Wainwright*, 407 U.S. 371 (1972), and the lower courts have uniformly ruled that the admission of a defendant's statements obtained in violation of *Miranda* also can be harmless. The error here is not materially different from the errors in those cases. Finally, there is no reason to adopt a rule of automatic reversal simply because the violation is the product of government misconduct. This Court has declined to adopt that rule for Fourth and Sixth Amendment violations, even though violations of those rights also involve government misconduct, and even though the need to deter those violations is just as great as in the case of violations of the Fifth Amendment.

ARGUMENT

I. RESPONDENT'S CONFESSION WAS PROPERLY ADMITTED AT TRIAL

A. The Constitution Bars The Admission Of A Defendant's Statements Only If Coercive Government Misconduct Overbears The Defendant's Free Will

1. A suspect's confession is involuntary if, due to coercive government misconduct, his "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973) (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.)); *Colorado* v. *Connelly*, 479 U.S. 157, 163-167 (1986). In making that determination, courts must assess "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226. The relevant characteristics of the suspect are ones that affect his vulnerability to pressure, such as his age, intelligence, education, criminal experience, and physical condition.[2] The relevant details of the

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[2] See, *e.g.*, *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958); *Fikes* v. *Alabama*, 352 U.S. 191, 196 (1957); *Leyra* v. *Denno*, 347 U.S. 556,

interrogation relate to the government's conduct and the conditions under which the suspect was questioned, including the site and length of interrogation or detention, whether counsel was made available, and whether the suspect was advised of his constitutional rights.[3]

Some police conduct, such as extraction of a confession through "beatings and other forms of physical and psychological torture," is so "inherently coercive" that it precludes a voluntary confession regardless of the circumstances. *Miller* v. *Fenton*, 474 U.S. 104, 109, 110 (1985); *Stein* v. *New York*, 346 U.S. 156, 182 (1953). Other interrogation techniques are considered improper only if, "in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." *Miller* v. *Fenton*, 474 U.S. at 110.

2. The Arizona Supreme Court recited the "totality of the circumstances" test, Pet. App. A20, but did not apply it. Instead, it held that respondent's statements to Anthony Sarivola were involuntary because respondent uttered those statements in response to Sarivola's offer of protection. In so ruling, the court relied on a passage from *Bram* v. *United States*, 168 U.S. 532, 542-543 (1897), in which this Court wrote that a statement is involuntary if it is obtained by "any direct or implied promises, however slight, [or] by the exertion of any improper influence." The Arizona court's analysis is wrong because the language from *Bram* on which it was based is no longer an accurate statement of the law.

a. In *Bram*, the defendant, a sailor, was arrested and jailed in Halifax, Nova Scotia, for a murder committed on the high seas. He was brought to the office of a police detective, where, alone with the detective and stripped of his clothing, he was interrogated. 168 U.S. at 534-536,

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559 (1954); *Stein* v. *New York*, 346 U.S. 156, 185 (1953); *Haley* v. *Ohio*, 332 U.S. 596, 599-601 (1948).

[3] See, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978); *Davis* v. *North Carolina*, 384 U.S. 737, 740-741 (1966); *Miranda* v. *Arizona*, 384 U.S. 436, 469 (1966); *Chambers* v. *Florida*, 309 U.S. 227, 239-240 (1940).

561-562. During questioning, the detective told Bram that another sailor had reported that, from his position at the wheel of the vessel, he saw Bram commit the murder. Bram responded: "[H]e could not see me from there." *Id.* at 539, 562. The detective also advised Bram that "[i]f you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." *Id.* at 539. Bram then said that the other sailor was the murderer. *Ibid.*

This Court held that Bram's first inculpatory statement was involuntary. 168 U.S. at 562-564. In so ruling, the Court considered the totality of the circumstances, stating: "Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who in law could be considered a free agent." *Id.* at 563-564. The Court then concluded that the detective's remark that Bram should identify his accomplice and not shoulder the entire blame for the murder "imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement." *Id.* at 564-565. The Court held that this suggestion automatically rendered the statement involuntary. In reaching that conclusion, the Court relied on and quoted from a contemporary criminal law treatise: "a confession, in order to be admissible, must be free and voluntary: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." 168 U.S. at 542-543 (quoting 3 *Russell on Crimes* 478 (6th ed. 1896)).

Taken literally, the quoted passage from *Bram* would bar any confession resulting from any promise or inducement by government officials, regardless of the nature of the inducement or a defendant's ability to resist it. A literal reading of that passage is at odds with numerous

later decisions by this Court using a totality-of-the-circumstances approach and abjuring hard-and-fast rules of involuntariness where the fact or threat of violence is not present. To be sure, the Court has occasionally quoted the passage in *Bram* with approval.[4] But when confronted with confessions obtained as a result of government threats or promises, the Court has not applied the strict rule in *Bram*, but instead has applied the totality-of-the-circumstances test.[5] The Court's two most recent decisions citing the passage from *Bram* show that the Court no longer adheres to the test suggested by that passage.

In *Brady* v. *United States*, 397 U.S. 742 (1970), the Court rejected the claim that a defendant's guilty plea to kidnapping, made with the advice of counsel, was involuntary because the defendant entered the plea in order to avoid the possibility of the death penalty, which was later held unconstitutional. 397 U.S. at 749-755. The Court held that *Bram* did not require a contrary result. *Id.* at 753-755. The Court described *Bram* as dealing with "a confession given by a defendant in custody, alone and unrepresented by counsel," *id.* at 754, and read *Bram* to hold only that "*[i]n such circumstances*, even a mild promise of leniency was sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." *Ibid.* (emphasis added). The Court read *Bram* not to foreclose the possibility that

[4] See, *e.g.*, *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 347 (1963); *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964).

[5] See *Haynes* v. *Washington*, 373 U.S. 503, 513-514 (1963) (threat of continued incommunicado detention and promise of communication with and access to family); *Lynumn* v. *Illinois*, 372 U.S. 528, 531, 534 (1963) (promise of leniency and threat that defendant's children would be taken from her); *Payne* v. *Arkansas*, 356 U.S. at 567 (threat to admit lynch mob into jail); *Leyra* v. *Denno*, 347 U.S. at 560-561 (promise of leniency); *Stein* v. *New York*, 346 U.S. at 167, 184-186 (promises that defendant's father would be released and that his brother would not be prosecuted)

the coercive impact of a promise of leniency could be "dissipated by the presence and advice of counsel." *Ibid.* Thus, far from viewing *Bram* as establishing a flat rule excluding all confessions resulting from government promises or inducements, *Brady* read *Bram* as turning on the conduct of the police in creating pressure and the suspect's capacity to resist that pressure under the particular facts of that case.

In *Hutto* v. *Ross*, 429 U.S. 28 (1976), the defendant claimed that his confession was involuntary on the ground that he would not have made it but for his plea bargain, from which he subsequently withdrew. The Court rejected that claim because the plea bargain did not require the defendant to confess. 429 U.S. at 30. Despite the broad language of the *Bram* rule, which the Court quoted, the Court in *Hutto* stated that "causation in [the "but-for"] sense has never been the test of voluntariness." *Ibid.* *Hutto* thus stands for the principle that "it does not matter that the accused confessed because of [a] promise, so long as the promise did not overbear his will." *Miller* v. *Fenton*, 796 F.2d 598, 608 (3d Cir.), cert. denied, 479 U.S. 989 (1986).[6]

Mindful of this Court's decisions, the federal courts of appeals also have not read *Bram* literally, since doing so "would be in conflict with the well-established rule that the totality of the circumstances must be considered in determining whether the confession is the result of overbearing by the police authorities." *Tippitt* v. *Lockhart*, 859 F.2d 595, 597 (8th Cir. 1988), cert. denied, 109

[6] As the Third Circuit noted in *Miller*, while *Brady* and *Hutto* quoted the passage from *Bram*, those cases did not interpret it "as a *per se* proscription against promises made during interrogation." Instead, the Court has interpreted "the words 'obtained by . . . promises' in the *Bram* test * * * to mean 'obtained because the suspect's will overborne by . . . promises.'" 796 F.2d at 608. Under that interpretation, "promises do not trigger an analysis different from the totality of the circumstances test." *Ibid.* See also *Haynes* v. *Washington*, 373 U.S. at 513 (after citing *Bram*, Court stated, "of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances."

S. Ct. 2452 (1989). Some courts, in cases involving confessions obtained as a result of government promises, have explicitly held that *Bram* did not impose a per se rule.[7] Other courts, after citing *Bram*, have applied a totality-of-the-circumstances test, or have indicated that a confession is not necessarily coerced because it was made in response to a government promise.[8] In essence, the circuits have concluded that "a review of the totality of the circumstances is still required and any inducement offered to the defendant is but one fact, albeit an important one, in that analysis." *United States* v. *Long*, 852 F.2d 975, 977 (7th Cir. 1988); see *Tippitt*, 859 F.2d at 597 ("a promise is merely one of the circumstances to determine whether the statement was freely and voluntarily given"). Using that test, the courts of appeals have routinely upheld confessions made in response to various inducements, such as a promise to bring the suspect's cooperation to the prosecutor's attention or to release the suspect on bail.[9]

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[7] *E.g.*, *Tippitt*, 859 F.2d at 597; *United States* v. *Long*, 852 F.2d 975, 977 (7th Cir. 1988); *Green* v. *Scully*, 850 F.2d 894, 901 (2d Cir.), cert. denied, 488 U.S. 945 (1988); *United States* v. *Guerrero*, 847 F.2d 1363, 1366-1367 (9th Cir. 1988); *United States* v. *Garot*, 801 F.2d 1241, 1245 (10th Cir. 1986); *Miller*, 796 F.2d at 608; *United States* v. *Ferrara*, 377 F.2d 16, 17 (2d Cir.), cert. denied, 389 U.S. 908 (1967).

[8] *Streetman* v. *Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987); *Jarrell* v. *Balkcom*, 735 F.2d 1242, 1250 (11th Cir. 1984), cert. denied, 471 U.S. 1103 (1985); *United States* v. *Robinson*, 698 F.2d 448, 455 (D.C. Cir. 1983). See *Miller* v. *Fenton*, 796 F.2d at 609 n.10.

[9] *E.g.*, *Tippitt*, *supra*; *Long*, *supra*; *Green*, *supra*; *Guerrero*, 847 F.2d at 1366; *Cole* v. *Lane*, 830 F.2d 104 (7th Cir. 1987), cert. denied, 484 U.S. 1076 (1988); *United States* v. *Guarno*, 819 F.2d 28, 30-31 (2d Cir. 1987); *Garot*, 801 F.2d at 1243-1246; *Miller*, *supra*; *Martin*, 770 F.2d at 924-928; *United States* v. *Shears*, 762 F.2d 397, 400-403 (4th Cir. 1985); *United States* v. *Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985); *Robinson*, 698 F.2d at 455; *United States* v. *Fera*, 616 F.2d 590, 594 (1st Cir.), cert. denied, 446 U.S. 969 (1980); *United States* v. *Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978); *United States* v. *Curtis*, 562 F.2d 1153, 1154 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States* v. *Pomares*, 499 F.2d 1220, 1222 (2d Cir.), cert. denied, 419 U.S. 1032 (1974); *United States* v. *Frazier*, 434 F.2d 994, 995-996 (5th Cir. 1970); *Ferrara*, 377 F.2d at 17. As Judge Easterbrook commented in his concurring opinion in *Long*, 852 F.2d at 980, "*Bram* has not excluded a confession in decades; it is a derelict, offering false hope to suspects and vexing judges who must distinguish it on the way to decisions reached on other grounds."

b. The decisions cited above make it clear that under modern confession law, a promise of benefits in exchange for a confession is not ordinarily considered sufficient to overbear the free will of a criminal suspect. Instead, the courts have held that a suspect may often be perfectly capable of rationally and freely weighing the advantages and disadvantages of accepting such an offer, and that there is no impediment to admitting the confession under those circumstances.

In addition to not interfering with the exercise of free will, inducements also do not ordinarily run afoul of the other policies underlying the principle of voluntariness—ensuring that confessions are reliable and avoiding reliance on evidence produced by unconscionable means. See Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va. L. Rev. 859, 909-924 (1979). Except in the most extreme cases, inducements offered in exchange for confessions are not regarded as outrageous government conduct. And, unlike threats of physical violence, inducements are seldom so attractive that a suspect will falsely incriminate himself in order to obtain the promised benefit.

A literal reading of *Bram* would ignore the fact that some governmental inducements, far from being "so offensive to a civilized system of justice that they must be condemned," *Miller* v. *Fenton*, 474 U.S. at 109, work to a suspect's advantage. A suspect who reasonably (and correctly) believes that he is likely to be convicted even without his confession can make a rational, even wise, decision to cooperate with the government in exchange for a benefit, such as leniency in charging or sentencing. For the government, confessions provide certainty, reduce the commitment of investigative and prosecutorial

resources, and often lead to cooperation by the defendant in making other cases. Such a mutually beneficial "exchange of leniency for information, a common trade in the criminal justice system, is a good thing." *Long*, 852 F.2d at 980 (Easterbrook, J., concurring).

Although most courts have declined to follow the cited passage from *Bram* according to its terms, the Arizona Supreme Court's reliance on that passage in this case shows that it can still mislead courts faced with the task of assessing the voluntariness of a confession. This Court should make clear that the literal "no inducement" rule stated in *Bram* has long since lost whatever force it may have had, and that in deciding whether a statement made in response to governmental inducement is admissible, courts should not apply a per se rule of inadmissibility.

B. Sarivola's Offer To Protect Respondent's Safety In Exchange For His Explanation Of His Stepdaughter's Death Did Not Coerce Respondent's Confession

This is not a case in which the government's conduct was so inherently coercive that it necessarily rendered any confession involuntary.[10] Respondent spoke to Sarivola, with whom he was on friendly terms, during a casual conversation while the two men were taking an evening stroll around the prison track. Sarivola did not summon respondent or interrogate him, their conversation was not lengthy, and respondent was at all times

[10] Actions of a private party cannot violate due process and render a defendant's statements involuntary. *Connelly*, 479 U.S. at 166. The court below treated Sarivola as a government agent, and the petition does not take issue with that ruling. We thus do not address that question in this case. We do note, however, that in many cases an informant will be held on a loose tether and it would be unreasonable to attribute all of his actions to the government. In this case, the FBI agent did not tell Sarivola to threaten or question respondent, nor did the agent direct Sarivola's efforts to learn whether the rumor was true. Moreover, Sarivola was not being paid for his services when he questioned respondent about Jeneane's murder on the night at issue. J.A. 78-79, 81-82, 87-88, 108-109.

free to leave Sarivola's company. Nothing in the exchange between Sarivola and respondent remotely resembled the interrogation of a suspect in a police-dominated, custodial environment that could generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966). As far as respondent was concerned, when he confessed to Sarivola he was merely confiding to a friend in private under circumstances in which he rationally concluded that it was in his interest to do so.[11]

Sarivola did not use or threaten violence against respondent. On the contrary, Sarivola offered to use his influence as an associate of the Columbo organized crime family to protect respondent from harm by other inmates. There is no suggestion that the rumors about respondent's involvement in the murder or the hints of danger to respondent from other inmates were creations of Sarivola's, concocted in order to induce respondent to confess to the murder. There is also no evidence that respondent was explicitly threatened by other inmates. To be sure, Sarivola said that respondent was "starting to get some rough treatment and whatnot from the guys" because of the rumor. J.A. 83. Sarivola also said that an inmate who was "known" to have murdered a child or who had "admitted" doing so would be "ostracized and possibly in danger from the general population." J.A. 110; 12/11/85 Tr. 63. But respondent was in no immediate danger from other inmates when he spoke with Sarivola, and nothing in the record suggests that

[11] In our amicus brief in *Illinois* v. *Perkins*, No. 88-1972 (argued Feb. 20, 1990) (a copy of which has been provided to the parties), we argued that a meeting between an undercover officer and a prisoner in a normal prison setting bears none of the hallmarks of a coercive environment. There is no significant difference for purposes of this argument between an undercover officer who is posing as a prisoner and a prisoner, such as Sarivola, who is serving as a government informant. We also argued in *Perkins* that deception does not constitute coercion. That argument also applies to this case.

Sarivola overstated the danger posed by the other inmates in order to induce respondent to confess.[12]

Sarivola did not demand that respondent confess in return for his protection; Sarivola only asked respondent to speak the truth about the matter. If respondent had been innocent, he could have said so and presumably still would have received Sarivola's protection. For that reason, Sarivola's offer was not one likely to elicit a false confession; the case for admitting respondent's statement is therefore even stronger than when the police have made an offer that requires an admission of guilt in return.[13] In sum, because respondent did not act under the influence of an immediate threat of serious physical injury, Sarivola did not make respondent an offer that he couldn't refuse; respondent's statement to Sarivola was the product of an exercise of free will, as this Court has used that term,[14] and was properly admitted at trial.

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[12] Of course, prison authorities had a duty to protect respondent, since respondent was incarcerated. See *DeShaney* v. *Winnebago County DSS*, 109 S. Ct. 998, 1004-1005 & n.5 (1989). There is nothing to suggest, however, that the government was derelict in that regard.

[13] Respondent also was not a juvenile caught up for the first time in the criminal justice system, who might be particularly susceptible to Sarivola's influence. Respondent was 42 years old; he had six prior felony convictions; and he had been imprisoned on three prior occasions. Presentence Report 1, 8-9 (Feb. 5, 1986).

[14] As this Court has noted, the "voluntariness rubric," which is based in part on the suspect's capacity to exercise "free will," has been subject to much criticism on the ground that it has failed to provide discernible standards for courts to apply. *Miller* v. *Fenton*, 474 U.S. at 116 n.4. Although it is unnecessary in this case for the Court to explore the proper scope of the "free will" component of voluntariness, we submit that Professor Grano's formulation is appropriately sensitive to the competing moral and practical interests. He advocates a principally objective test under which the "free will" or "mental freedom" component of the due process voluntariness test would ask "whether a person of ordinary firmness, innocent or guilty, having the defendant's age, physical condition, and relevant mental abnormalities (but not otherwise having the defendant's personality traits, temperament, intelligence, or social background), and strongly preferring not to confess, would find the interrogation pressures overbearing." Grano, *supra*, 65 Va. L. Rev. at 906.

II. THE ERRONEOUS ADMISSION OF AN INVOLUNTARY CONFESSION SHOULD NOT CALL FOR AUTOMATIC REVERSAL OF A CONVICTION, WITHOUT REGARD TO WHETHER THE ERROR MAY BE HARMLESS

In its initial decision, the Arizona Supreme Court ruled that the erroneous admission of respondent's confession to Anthony Sarivola was harmless beyond a reasonable doubt. In its second opinion, it held that that error required reversal since this Court's decisions forbid an appellate court from inquiring whether such an error was harmless. Those decisions also trace their lineage to *Bram*, which held that the erroneous admission of the defendant's confession automatically requires reversal of his conviction. 168 U.S. at 541-543. This case raises the question whether that rule should be abandoned. We submit that it should.

A. Developments In The Harmless Error Doctrine Since *Bram* Have Rendered Obsolete The Rule Of Per Se Reversal Set Forth In That Case

Bram was decided during a period of our legal history when any trial error required reversal of a defendant's conviction, and no error was too trivial to be found harmless. As one prominent jurist has noted, "[t]here was a time in the law, extending into our own century, when no error was lightly forgiven. In that somber age of technicality the slightest error in a trial could spoil the judgment. The narrow bounds of propriety were entirely surrounded by booby traps." R. Traynor, *The Riddle of Harmless Error* 3 (1970). Throughout that period, "courts of review 'tower[ed] above the trials of criminal cases as impregnable citadels of technicality.'" *Kotteakos* v. *United States*, 328 U.S. 750, 759 (1946). "So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing re-

versible error in the record, only to have repeated the same matching of wits when a new trial had thus been obtained." *Ibid.*

Judges and scholars such as Taft, Wigmore, Pound, and Cardozo criticized that state of affairs on the ground that "justice, though due to the accused, is due to the accuser also," *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934). See *Kotteakos*, 328 U.S. at 758-760 (collecting authorities). Spurred by that criticism, Congress and the States early in this century launched a "broad attack" against such "abuses," *id.* at 759, by adopting harmless error statutes "to keep the balance true," *Snyder*, 291 U.S. at 122, between society's interest in convicting the guilty and an innocent person's interest in avoiding an unjust conviction. Harmless error statutes and rules have now been adopted in every jurisdiction. *Chapman* v. *California*, 386 U.S. 18, 22 (1967). *E.g.*, 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). They require courts to disregard errors that do not materially affect the verdict, and they typically include the type of error held automatically fatal in *Bram*, the erroneous admission of evidence.

Even though the purpose of the harmless error doctrine was "[t]o substitute judgment for automatic application of rules," *Kotteakos*, 328 U.S. at 760, during the 70 years following *Bram* this Court frequently reiterated the rule of automatic reversal for the erroneous admission of confession evidence without inquiring whether that rule had survived contemporary developments in harmless error jurisprudence.[15] Yet in 1967

[15] See *Lyons* v. *Oklahoma*, 322 U.S. 596, 597 n.1 (1944); *Malinski* v. *New York*, 324 U.S. 401, 404 (1945); *Haley* v. *Ohio*, 332 U.S. at 599; *Gallegos* v. *Nebraska*, 342 U.S. 55, 63 (1951); *Stroble* v. *California*, 343 U.S. 181, 190 (1952); *Brown* v. *Allen*, 344 U.S. 443, 475 (1953); *Payne* v. *Arkansas*, 356 U.S. at 568; *Spano* v. *New York*, 360 U.S. 315, 324 (1959); *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960); *Lynumn* v. *Illinois*, 372 U.S. at 537; *Haynes* v. *Washington*, 373 U.S. at 518; *Jackson* v. *Denno*, 378 U.S. 368, 376 (1964); *Chapman* v. *California*, 386 U.S. at 23 & n.8; *Lego* v. *Twomey*, 404 U.S. 477, 483 (1972); *Rose* v. *Clark*, 478 U.S. 570, 577, 578 n.6 (1986).

this Court in *Chapman* v. *California*, *supra*, adopted the general rule that a constitutional error does not automatically require reversal of a conviction. Since then, the Court has applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. *Rose* v. *Clark*, 478 U.S. 570, 578-579 (1986); *United States* v. *Hasting*, 461 U.S. 499, 509 (1983).[16] In light of contemporary principles

[16] Harmless error principles have been held applicable to a broad range of errors in state and federal proceedings. See, *e.g.*, *Clemons* v. *Mississippi*, 110 S. Ct. 1441, 1450-1451 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Satterwhite* v. *Texas*, 486 U.S. 249 (1988) (admission of evidence at the sentencing stage of a capital case, in violation of the Sixth Amendment Counsel Clause); *Carella* v. *California*, 109 S. Ct. 2419, 2421 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497, 501-504 (1987) (jury instruction misstating an element of the offense); *Rose* v. *Clark*, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) (restriction on a defendant's right to cross-examine a witness for bias, in violation of the Sixth Amendment Confrontation Clause); *Rushen* v. *Spain*, 464 U.S. 114, 117-118 & n.2 (1983) (denial of defendant's right to be present at trial); *United States* v. *Hasting*, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper* v. *Evans*, 456 U.S. 605 (1982) (statute improperly forbidding trial court from giving a jury instruction on a lesser included offense in a capital case, in violation of the Due Process Clause); *Kentucky* v. *Whorton*, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of the Sixth Amendment Counsel Clause); *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (admission of the out-of-court statement of a nontestifying co-defendant in violation of the Sixth Amendment Confrontation Clause); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession in violation of the Sixth Amendment Counsel Clause); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

of harmless error law, the per se rule in *Bram* can no longer be justified and should be expressly repudiated.

B. The Admission Of A Defendant's Involuntary Confession Is Not The Type Of Error That Automatically Requires A Conviction To Be Reversed

1. A basic principle of modern American law—applicable equally to criminal and civil cases, and to constitutional and nonconstitutional claims—is that a trial court's judgment should not be reversed if the party defending that judgment can show that any error that occured at trial had no effect on the outcome. That principle, which is the essence of the harmless error rule, recognizes that the trial of a criminal case can be an extremely complex undertaking, and that correcting every error that occurs before or during a criminal trial by ordering a new trial is both costly and pointless. New trials consume scarce resources and introduce additional delays into the administration of justice. Delay is the enemy of truth and can make a retrial difficult, if not impossible, because the memories of witnesses can fade, witnesses may decline to testify, they may move or die, and critical evidence can be lost. Even if a new trial rectifies errors made at the first trial, there is still the risk that new and different errors will take their place. Nor is the accuracy of verdicts the only victim of delay. All of the participants in the criminal justice system—judges, prosecutors, victims of crime, the community, as well as the persons accused of crime—have a powerful interest in resolving criminal charges at one trial, if possible.[17] The harmless error doctrine therefore serves

[17] Retrials increase the trial court's case load, which inevitably delays the disposition of other cases, decreases the care with which the court can handle the matters before it, and consumes valuable time that could be spent on legal study, thus increasing the risk of mistake in every case that the judge tries. Retrials increase the burden on the prosecution, which may force the prosecutor to agree to plea bargains that would otherwise be unacceptable, or to abandon some cases altogether. Delays can burden other defendants, whose trials must be postponed in order to accommodate retrials in other cases. Witnesses needlessly relive painful experiences, which deters

a variety of important interests in the administration of justice and reinforces "the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986).

Of course, if an error creates a substantial risk that an innocent person has been convicted, the judgment cannot be allowed to stand. Moreover, this Court has acknowledged that some constitutional errors are so inconsistent with fundamental fairness or inherently so prejudicial that reversal of a conviction is necessary whenever they occur. Such errors include a trial before a judge with a financial interest in the outcome and the complete denial of counsel at trial. *Clark*, 478 U.S. at 577-579. In Justice Harlan's words, those errors "have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless." *Chapman*, 386 U.S. 52 n.7 (dissenting opinion). The other errors that the Court has placed in that category also involve instances in which it is impossible to make a reliable determination of prejudice, or in which an error strikes at fundamental societal values that transcend the criminal process and outweigh society's otherwise compelling interest in convicting persons who commit crimes.[18]

voluntary cooperation with the criminal justice system and makes victims of crime also victims of the system. The community's interest in retribution and in the swift administration of justice is harmed by delay, as is society's interest in the incapacitation, rehabilitation, and deterrence of offenders. And when a person accused of a serious crime is free on bail, a delay in bringing his prosecution to a close prolongs public anxiety over community safety and increases the risk that he will commit new crimes while at large.

[18] See *Young* v. *Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion) (appointment of a prosecutor with a financial interest in the outcome creates an appearance of impropriety and has effects on the prosecution that are difficult to assess); *Rose* v. *Clark*, 478 U.S. at 578 ("harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from the

2. *Bram* held that the erroneous admission of a defendant's statement always requires reversal since, as a matter of logic, a specific item of evidence cannot be both probative and nonprejudicial. 168 U.S. at 541-543. There is a "contradiction," *Bram* concluded, between "the assertion that the statement of an accused tended to prove guilt, and therefore was admissible," and the argument on appeal that the same statement "did not tend to prove guilt, and could not, therefore, have been prejudicial," *id.* at 542.

While the assertion that probative evidence could be harmless may have seemed contradictory at the turn of the century, there is no such contradiction under modern principles of appellate review. In the modern system, the analysis that a trial court performs to decide whether

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grand jury strikes at fundamental values of our society and does not lend itself to harmless error analysis); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (erroneous denial of a defendant's right to represent himself at trial cannot be harmless, since exercise of the right increases the likelihood of conviction); *Jackson* v. *Virginia*, 443 U.S. 307, 320 n.14 (1979) (suggesting that failure to instruct a jury on the reasonable doubt standard cannot be harmless); *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978) (improper compulsory joint representation of defendants with conflicting interests does not lend itself to harmless error analysis because what conflict-free counsel could have done will not be clear from the record). Cf. *Waller* v. *Georgia*, 467 U.S. 39, 49 & n.9 (1984) (defendant need not show specific prejudice in order to obtain reversal because of denial of a public trial, due to difficulty of making that showing).

In some instances, prejudice is an element of a constitutional violation. See, *e.g.*, *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (prosecution's failure to disclose potentially exculpatory evidence); *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984) (ineffective assistance of counsel); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 874 (1982) (deportation of potential defense witness); *Weatherford* v. *Bursey*, 429 U.S. 545, 554-557 (1977) (defendant's right to counsel not infringed where attorney-client information obtained by government informant had no effect on the trial). Such claims are not subject to harmless error analysis, since it is redundant to ask whether an error affected the outcome if the defendant has already shown that the error was prejudicial in proving its existence.

to admit evidence is not the same as the analysis that an appellate court uses to decide whether the erroneous admission of that evidence is harmless. A trial judge generally must admit all "relevant" evidence, *i.e.*, evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. That threshold is a very low one, and does not require that an item of evidence be sufficient to sustain a judgment in a proponent's favor in order for it to be admitted.[19] The harmless error inquiry is quite different. Under that analysis, an appellate court must uphold a judgment after reviewing the entire record if erroneously admitted evidence did not have a "substantial influence" on the outcome of the trial. *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988); *Kotteakos*, 328 U.S. at 765. Thus, a specific item of evidence can be probative, because it has some tendency to prove a matter at issue, but insignificant in the context of the entire record, if other evidence overwhelmingly proves the same matter, or if the evidence relates only to a matter that was not disputed. The "contradiction" that troubled the Court in *Bram* is present only when an erroneously admitted item of evidence is the *sole* proof of a disputed issue. In all other cases, there is no necessary contradiction between the conclusion that evidence is probative and the conclusion that its erroneous admission is nonprejudicial.

3. Although contemporary harmless error doctrine has eliminated the logical justification for the rule adopted in

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[19]E. Cleary, *McCormick on Evidence* § 185, at 542-543 (3d ed. 1984) ("An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. * * * Whether the entire body of evidence is sufficient to go to the jury is one question. Whether a particular item of evidence is relevant to his case is quit another. * * * A brick is not a wall.") (footnotes omitted); 1A J. Wigmore, *Evidence* § 29, at 976 (P. Tillers rev. ed. 1983); Notes of Advisory Committee on Proposed Rules, 28 U.S.C. at 744 (1988) ("[I]t is not to be supposed that every witness can make a home run").

Bram, one could seek to defend the rule on practical grounds. It could be argued that admission of a defendant's coerced confession should always be held prejudicial since "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him," *Cruz* v. *New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting), and because when a coerced confession is part of the evidence before the jury, "no one can say what credit and weight the jury gave to the confession," *Payne* v. *Arkansas*, 356 U.S. 560, 568 (1985). Since a defendant's confession is extremely powerful evidence that is likely to be prejudicial in most cases, the argument runs, it is reasonable and efficient to adopt a rule of automatic reversal.

That argument, however, is flawed. It is true that the erroneous admission of a defendant's confession will very often be prejudicial. But it does not follow that the admission of the defendant's confession can *never* be harmless. The uniquely powerful impact of most confession evidence simply means that the government will often be unable to carry its burden of establishing that the error of admitting an involuntary confession was harmless. But that is no reason to adopt a rule of law barring the government from *ever* making that showing. In many cases, such as this one, the defendant may have made a second (or third, or fourth) admissible confession that is similar to the one held inadmissible.[20] Other proof, such as videotape evidence, eyewitness testimony, the testimony of confederates, the fruits of a crime (such as narcotics found on the defendant's person), recorded wiretap conversations, fingerprints, or genetic identification, may supply overwhelming proof of the accused's guilt.

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[20] It is not uncommon for defendants to make multiple inculpatory statements. *E.g.*, *United States* v. *Bayer*, 331 U.S. 532 (1947); *Stroble*, *supra*; *Westover* v. *United States*, decided together with *Miranda*, *supra*; *Oregon* v. *Elstad*, 470 U.S. 298, 322-324 nn.3-6 (1985) (Brennan, J., dissenting) (citing 50 lower court cases).

In addition, not all statements by defendants constitute full admissions of guilt. In many instances, a defendant's statement may be only moderately inculpatory, and the prejudicial effect of that statement may be overwhelmed by other aspects of the government's case. In each instance, the government may be able to carry its burden under *Chapman*, and in some cases it may be able to do so without great difficulty. There is no principled reason to deny the government that opportunity.

The Court has applied harmless error analysis in several closely related contexts where it also could have been argued that erroneously admitted evidence would ordinarily seal a defendant's fate. For instance, *Satterwhite* v. *Texas*, 486 U.S. 249, 256 (1988), and *Milton* v. *Wainwright*, 407 U.S. 371 (1972), held that the admission of a defendant's statements obtained in violation of the Sixth Amendment is subject to harmless error analysis. The Court so ruled even though the impact of the inadmissible evidence would appear to be the same as the impact of a confession secured in violation of the Fifth Amendment. Similarly, *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977), *Gilbert* v. *California*, 388 U.S. 263, 274 (1967), and *United States* v. *Wade*, 388 U.S. 218, 242 (1967), held that the admission of evidence obtained at a post-indictment lineup in violation of the Sixth Amendment is subject to harmless error analysis, even though the Court recognized that an identification at a lineup "might well settle the accused's fate and reduce the trial to a mere formality," *Wade*, 388 U.S. at 224. And *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973), *Schneble* v. *Florida*, 405 U.S. 427 (1972), and *Harrington* v. *California*, 395 U.S. 250 (1969), held that the admission of an out-of-court statement of a nontestifying co-defendant is subject to harmless error analysis. The Court so ruled even though it had previously held that admission of such evidence could be "devastating" to the accused, *Bruton* v. *United States*, 391 U.S. 123, 136 (1968), that it creates a "serious flaw[] in the fact-finding process at trial," *Roberts* v. *Russell*, 392 U.S. 293, 294 (1968), and that it

poses "a serious risk that the issue of guilt or innocence may not have been reliably determined," *id.* at 295.

Implicit support for that point can be found in the uniform ruling of lower courts that the admission of a defendant's statements obtained in violation of *Miranda* is subject to harmless error analysis.[21] Although statements taken in violation of *Miranda* and statements taken in violation of the principles of voluntariness are inadmissible for different reasons, they are likely to have a similar impact on the jury if they are admitted; if anything, statements taken in violation of *Miranda* are likely to have an even greater impact, as the jury will have less reason in that setting to believe that the statements are the unreliable products of coercion or other improper investigative conduct. Nonetheless, a per se rule of reversal has not been applied in the *Miranda* setting, and such a rule is equally inappropriate here.

This Court has made clear that automatic reversal is unwarranted when an error does not "affect the composition of the record." *Rose* v. *Clark*, 478 U.S. at 579 n.7. If appellate review "does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence * * * there is no inherent difficulty in evaluating whether the error prejudiced [a defendant] in th[e] case." *Ibid.* As the Court explained in *Satterwhite* v. *Texas*, 486 U.S. at 256-257, and *Holloway* v. *Arkansas*, 435 U.S. 475, 490 (1978), "[i]n the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the delib-

[21] *E.g.*, *Howard* v. *Pung*, 862 F.2d 1348, 1351 (8th Cir. 1988), cert. denied, 109 S. Ct. 3247 (1989); *United States* v. *Johnson*, 816 F.2d 918, 923 (3d Cir. 1987); *Bryant* v. *Vose*, 785 F.2d 364, 367 (1st Cir.), cert. denied, 477 U.S. 907 (1986); *Martin* v. *Wainwright*, 770 F.2d 918, 932 (1985), modified, 781 F.2d 185 (11th Cir.), cert. denied, 479 U.S. 909 (1986); *United States* v. *Ramirez*, 710 F.2d 535, 542-543 (9th Cir. 1983); *Harryman* v. *Estelle*, 616 F.2d 870, 875 (5th Cir.) (en banc), cert. denied, 449 U.S. 860 (1980).

erations of the jury." Harmless error analysis is permissible, the *Satterwhite* Court noted, "in both capital and noncapital cases where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial." 486 U.S. at 257.

The error in this case is indistinguishable from the ones in *Satterwhite*, *Milton*, *Moore*, and *Brown*, because this case also involves the erroneous admission of evidence. Reviewing courts can examine the record to gauge whether that error was harmless. That the error violated the Fifth Amendment, not the Sixth, does not make that inquiry any more difficult.

In sum, when the error at issue is the improper admission of evidence, it is not necessary to speculate about what the record would have reflected if the error had not been committed. For that reason, it is not surprising that, other than coerced confessions, there is no class of evidence the erroneous admission of which has been held to be per se prejudicial.

4. It could be argued that a rule of automatic reversal is necessary to protect values other than the accuracy of verdicts. Cf. *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (discrimination in the selection of grand jurors). Coerced confessions are inadmissible not only because they are considered unreliable, but also because due process forbids the police from using interrogation techniques "offensive to a civilized system of justice," *Miller* v. *Fenton*, 474 U.S. at 109, whether or not a confession is reliable. *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964). It could therefore be argued that coerced confessions should be exempt from harmless error analysis, since they are excluded in part for reasons independent of the accuracy of the verdict.[22]

[22] Justice Harlan made a closely related argument in his dissent in *Chapman* v. *California*, *supra*. He suggested that certain types of intentional official misconduct should always result in reversal to demonstrate society's intolerance for such misbehavior. 386 U.S. at 52 n.7. That theory is similar to the one stated in the text. To the extent it differs, that theory rests on a deterrence rationale, and

That argument, however, has already been rejected in other closely analogous contexts. Government misconduct that results in violations of the Fourth and Sixth Amendments may be at least as reprehensible as misconduct that results in a coerced confession. Yet this Court has consistently held harmless error principles applicable to evidence that is the product of such violations. See *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970); *Satterwhite* v. *Texas*, 486 U.S. at 256; *Milton* v. *Wainwright*, 407 U.S. at 372-373, 378-379. There is no reason to accord special status to a confession obtained by way of coercion, in contrast to physical evidence obtained as a result of an unlawful search, or statements obtained through a violation of the Sixth Amendment.

That conclusion is consistent with the role that due process plays in a criminal trial. As Justice Stevens wrote for a unanimous Court in *Mabry* v. *Johnson*, 467 U.S. 504, 511 (1984), "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." The Court made the same point in *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982) (citation omitted), explaining that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. * * * [T]he aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" If the admission of a defendant's confession is harmless beyond a reasonable doubt, the accused has not been denied a fair trial.

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is inconsistent with *United States* v. *Hasting*, 461 U.S. 499 (1983). There, the court of appeals reversed a conviction due to the prosecutor's comment on the defendant's silence at trial and declined to consider whether the error was harmless, since doing so "would impermissibly compromise the clear constitutional violation," 660 F.2d 301, 303 (7th Cir. 1980). This Court reversed, holding that "the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court [of appeals] viewed as prosecutorial overreaching." 461 U.S. at 507.

III. *STARE DECISIS* CONSIDERATIONS DO NOT PRECLUDE RECONSIDERATION OF THE RULES ADOPTED IN *BRAM*

The doctrine of *stare decisis* serves important purposes in our legal system. It promotes the evenhanded, predictable, and consistent development of legal principles; it fosters reliance on judicial rules; and it contributes to the fact and the appearance of integrity in the judicial process. *Vasquez* v. *Hillery*, 474 U.S. at 265-266. But "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision," *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940), especially when constitutional issues are involved, since "correction through legislative action is practically impossible." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting). *Stare decisis* "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Id.* at 407-408. And *stare decisis* has less weight when new facts or later cases have eroded the precedential value or rationale of a prior decision.[23]

This is just such a case. The rules adopted in *Bram* have not survived this Court's recent decisions on the issues of coerced confessions and harmless error. On both issues, *Bram* is "outdated, illogical, * * * [and] legitimately vulnerable to serious reconsideration." *Vasquez*, 474 U.S. at 266. What the Court wrote in *Puerto Rico* v. *Branstad*, 483 U.S. 219 (1987), about *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861), is equally true of *Bram*: It "is the product of another time[,] * * *

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[23] *E.g.*, *Alabama* v. *Smith*, 109 S. Ct. 2201, 2206 (1989); *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 241-248 (1987); *Puerto Rico* v. *Branstad*, 483 U.S. 219, 224-230 (1987); *United States* v. *Miller*, 471 U.S. 130, 144 (1985); *United States* v. *Leon*, 468 U.S. 897, 908-913 (1984); *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 357-361 (1984); *United States* v. *Salvucci*, 448 U.S. 83, 88 (1980); *Hughes* v. *Oklahoma*, 441 U.S. 322, 331-332 (1979).

[y]et this decision has stood while the world of which it was a part has passed away." 483 U.S. at 230.

CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

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